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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 37

TEXTILE WORKERS UNION OF AMERICA,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY, *et al.*

No. 41

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DARLINGTON MANUFACTURING COMPANY, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR TEXTILE WORKERS UNION OF AMERICA

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BRIEF FOR TEXTILE WORKERS UNION OF AMERICA

Opinion Below

The opinion of the Court of Appeals is reported at 325 F.2d 682 (R. 1894-1914).* The amendment to

* References to the Record preceding semicolon are to the Board's Findings; succeeding references are to the supporting evidence. References to Volume V of the Record are cited as "R.V.....".

the original opinion is found at R. 1916-1917. Findings of fact, conclusions of law, and the decision and order of the National Labor Relations Board are reported at 139 NLRB 241 (R. 1-246).

Jurisdiction

The judgments of the Court of Appeals were entered on November 19, 1963 (R. 1915, 1926-1927, 1933-1934). The petitions for writs of certiorari were granted on April 20, 1964, 377 U.S. 903, and the cases consolidated (R. 1935). Jurisdiction rests upon 28 U.S.C. 1254(1) and §10(e) and (f) of the National Labor Relations Act ("NLRA" or "Act") as amended.

Statute Involved

The provisions of the NLRA, as amended (61 Stat. 136, 29 U.S.C. §141 *et seq.*), and the Labor Management Relations Act of 1947 are set forth in relevant part in an appendix *infra*.

Questions Presented

1. Whether it is a violation of the National Labor Relations Act for an employer to shut down a plant in order to discourage union activity and to avoid having to bargain with the union (a) when the plant closed constitutes a separate business entity, and (b) when the plant is one of several constituting a single employer entity.

2. Whether the Board's finding that Darlington and the other Deering Milliken corporations together constituted a single employer entity, is supported by substantial evidence and entitled to judicial approval.

3. Whether the Board fashioned appropriate and adequate remedies in directing that the former Darlington workers be re-employed or placed on preferential lists for hiring at other Deering Milliken plants and that they be given back pay from the date of discharge, or whether such remedies are patently inadequate absent a further order directing the re-establishment of a plant in Darlington, South Carolina.

4. Whether the Board erred in failing to hold Roger Milliken individually liable for the unfair labor practices committed by the employer.

Statement

A. The Facts

(1) Ownership and Control of Deering Milliken and Darlington

Darlington Manufacturing Company at the time of its shutdown and liquidation in December 1956 was one of 17 corporations operating textile mills owned and controlled by the Milliken family for whom Deering, Milliken & Company, Inc. acted as the exclusive sales agent and factor. (R. 110, 111). The Millikens then held a majority of the stock in Deering, Milliken & Company, Inc. and Cotwool Manufacturing Com-

pany,* and the Darlington stockholdings of the Milliken family, Deering Milliken and Cotwool together represented more than two-thirds of Darlington's outstanding stock (R. 23, 24, 213; 236-237, 1292-1300, 1308-1311).

The sole Darlington plant, which was located in Darlington, South Carolina (R. 51), primarily manufactured cotton printed cloth, as did three of the other mills in the Deering Milliken** complex (R. 25; 514-520, 522, 933, 935-936, 938-939).

(2) The Election Campaign at Darlington and the Resultant Unfair Labor Practices

When in March 1956 the Textile Workers Union of America, AFL-CIO (the "Union" or "TWUA") commenced its organizing campaign at the Darlington mill, petitioning the Board for a representation election (R. 4, 52), Darlington supervision immediately responded with threats that Roger Milliken would close down the mill if the Union won the election, stating that he had done so at other Deering Milliken mills which became unionized (R. 4, 6-7, 25; 325, 326-327, 344, 345-346, 350, 354-355, 361-363, 370). The workers were also subjected to systematic interrogation concerning their Union activity, and Union adherents were threatened with discharge and blacklist-

* Subsequently, in an internal reorganization, Deering Milliken & Company merged with Cotwool to form Deering Milliken, Inc. However, this merger had no effect on the operation or functions of the corporations within the Deering Milliken complex (R. 1332, 1872-1882).

** "Deering Milliken" refers to the entire complex of manufacturing and affiliated service corporations controlled by the Milliken family unless it is clear from the context that the reference is to the factoring and sales agency.

ing (R. 4, 6-7, 77; 303, 305, 313, 316, 317, 327, 334, 339, 345, 350, 354-356, 365, 376-377, 488-489, 490). Despite this blatant and unlawful interference and coercion, a majority of the workers, on September 6, 1956, voted in favor of the Union (R. 4; 250-251).

Roger Milliken, upon being informed of the Union victory, immediately determined to shut down the Darlington plant (R. 5; 263) and proceeded to set up a meeting to secure the approval of the Darlington directors (R. 4; 263, 422-425, 456-457, 464, 472, 476-477). On September 12, 1956, Darlington's seven-man Board of Directors, at a hastily convened and indecently brief meeting, dutifully voted to liquidate the mill and to call a special stockholders' meeting to approve that proposal (R. 5; 279-280; 431, 1257-1261, 1290, 1322). Upon being advised of the directors' decision, Darlington's supervisors told the workers that Roger Milliken had decided to close the mill because of the Union's NLRB victory and that they would be blacklisted from employment at other mills (R. 5, n.10, 6; 314, 327, 351-353, 357, 359, 370). At the same time supervisors solicited support for a petition disavowing the Union which was circulated in the hope of keeping the mill open (R. 5, n.10, 6; 323-324, 337, 359-360, 368-369, 381-383).

At the October 17th stockholders' meeting, Roger Milliken bluntly stated that the Darlington mill was being shut down because of the Union's election victory (R. 5; 292, 1262-1265), and an overwhelming majority of the stock was voted in favor of liquidation (R. 5; 438, 494-495, 1292, 1295. 1296-1300). In a conference held immediately following the stockholders' meeting, a State Senator who had been

present pleaded with Roger Milliken to reconsider, pointing out the disastrous repercussions of the shutdown on the City of Darlington, and arguing that the decision was "unfair" because 83% of the Darlington workers had "signed a petition to go back to work" (R. 5; 266). Roger Milliken responded: "As long as there are seventeen percent of the hard core crowd here, I refuse to run the mill" (R. 6; 266, 268).

On October 25, 1956, the Union notified Darlington that the Board certification had been received and requested that a bargaining conference be scheduled no later than October 30th (R. 253, 1244). When Darlington management ultimately met with the Union on November 7th they refused to discuss the Union's suggestions aimed at maintaining mill operations and preserving the jobs of the Darlington workers and declined to furnish the Union with information concerning the scheduling of layoffs which were then proceeding in anticipation of the ultimate plant shutdown (R. 71; 254-257, 1246-1253).

Plant operations ceased entirely on November 24, 1956, and on December 12th and 13th the plant was auctioned off piecemeal (R. 6; 258) despite the Union's earlier plea that an effort be made to secure a purchaser for the entire, equipped plant (R. 255). Thereafter, other mills in the Deering Milliken complex assumed Darlington's unfulfilled contracts or increased their sales to Darlington's former customers under new contracts (R. 928, 933-967).

In the meantime the treasurers of the remaining Deering Milliken mills were sent copies of a memorandum by Roger Milliken (characterized by the

Board (R. 25) as a "primer" for combatting union organizing), warning that unions were "going to make a tremendous drive all through this area and there are few things that are more important to us than making sure that the leaders in your community are sympathetic to what you are trying to do." Enclosed with this memorandum was a portion of a magazine article citing the Darlington shutdown and affirming that it had always been Deering Milliken's policy to shut down unionized mills (R. 25; 969, 1677).

B. Prior Proceedings, the Board's Order and Remedy, and the Decision of the Court Below

(1) The Prior Proceedings

On the basis of charges filed with the Board during the months of October and November, 1956, alleging violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5), a complaint was issued on December 4, 1956 and hearings were held in January and February, 1957. The further history of all the proceedings before the Board and Trial Examiner, as well as ancillary court proceedings, are fully set forth in the Board's Decision and Order (R. 1-3).

(2) The Board's Decision and the Remedy Ordered

The Board unanimously found that Darlington violated Section 8(a)(1) by interrogating employees concerning their Union activity, by threatening to close the mill if the TWUA won the election, by representing that the reason for the shutdown was the employees' activity in behalf of the Union, and by encouraging employees to sign a petition disavowing

the Union (R. 6-7). The Board also was unanimous in finding that Darlington violated Section 8(a)(5) by its refusal to bargain with respect to the tenure of employment of the workers in the Darlington mill and by the refusal to furnish wage and related bargaining information to the Union (R. 6-9, 19).

With member Rodgers dissenting, the Board further found that the Darlington plant shutdown had been retaliatory and motivated by anti-union considerations and thus constituted a violation of Sections 8(a)(1), (3) and (5) (R. 9-18).

Finally, with members Leedom and Rodgers dissenting, the Board found that Darlington, together with Deering Milliken and its affiliated corporations, constituted a single employer within the meaning of the Act because of common ownership and common control of labor relations and operations, thereby rendering Deering Milliken liable for the violations found against Darlington (R. 23, 27).

As to Roger Milliken individually, the Board unanimously dismissed the complaint on the ground that the underlying charge was insufficient in that it named him as "Roger Milliken, President" and that this did not constitute a sufficient charge against Roger Milliken individually (R. 29-30).

In its order, the Board required Darlington and Deering Milliken to cease and desist from the unfair labor practices found; and, if operations were resumed in Darlington, South Carolina, to bargain with the Union as the employees' exclusive representative (R. 30-31). Darlington and Deering Milliken were

further required to make whole all the employees who were on the payroll on Octobr 13, 1956 (the date on which the stockholders voted to liquidate the plant) for any loss of pay they had suffered as a result of the discrimination against them. If the Darlington plant were not reopened, the backpay period was to terminate when the employees are able to obtain substantially equivalent employment, or the date on which they are placed on a preferential hiring list at other Deering Milliken mills (R. 21-23, 27-28, 31, 32). Deering Milliken was required to offer the Darlington employees employment, or placement on a preferential hiring list, at other Deering Milliken mills in South Carolina or adjacent States; to pay the travel and moving expenses of the employees who accepted the offer; and to bargain collectively with the Union for the purpose of reaching an agreement as to the operation of the preferential hiring lists, and as to the terms and conditions under which the former employees of the Darlington mill might, if they desired, obtain such employment (R. 27-29, 32-33). Finally, Darlington and Deering Milliken were required to advertise in a Darlington newspaper and to mail and publish appropriate notices directed to the Darlington employees (R. 32-33, 39-42).

(3) The Decision of the Court of Appeals

The Court of Appeals, sitting *en banc*, by a 3-2 vote denied enforcement of the Board's order.

As to the violations found by the Board independent of the actual mill closing—the pre- and post-election statements constituting interference and violation of Section 8(a)(1), and the refusals to bargain

constituting violations of Section 8(a)(5), of the Act —a majority of the Court held that "remedies for these offenses are not now available as Darlington is no longer alive" (R. 1902). Reasoning that an employer has the "absolute prerogative" to "go out of business in toto or to discontinue it in part, permanently at any time," the majority held that there would be no unfair labor practice even if the shutdown were "spurred by unionization." (R. 1900)

The dissenting judges would have enforced the Board's order. In their view, "overwhelming" evidence supported the Board's finding that Darlington and Deering Milliken were a single employer; "abundant" evidence supported the Board's finding that the plant was shut down because of the employees' union activities and as a "grim deterrent to the thousands of employees in the [Deering Milliken] plants who might entertain similar notions of unionization"; and the shutdown of the Darlington mill was the equivalent of an employer's transferring or contracting out part of his operation in order to defeat a union, violative of Section 8(a)(3) of the Act. The dissenting judges also agreed, as the Board found, that the shutdown violated Sections 8(a)(1) and (5).

Summary of Argument

I

The holding by the court below that the employer had an absolute right to shut down its Darlington plant does violence to the underlying policy and the express language of the Act. The Board, with subse-

quent court approval, has repeatedly held the liquidation of a portion of a business unlawful when actuated by anti-union animus. *NLRB* v. *Missouri Transit Co.*, 250 F.2d 261 (8th Cir.). It matters not whether the employer's anti-union shutdown involves its entire plant, *NLRB* v. *Norma Mining Corp.*, 206 F.2d 38 (4th Cir.), one of several plants, *NLRB* v. *Somerset Classics, Inc.*, 193 F.2d 613 (2d Cir.), *cert. den.* 344 U.S. 816, or merely a part of the business, *NLRB* v. *Savoy Laundry, Inc.*, 327 F.2d 370 (2d Cir.).

II

Where, as here, the Board's finding that Darlington and the other Deering Milliken corporations together constituted a single employer is supported by substantial evidence, the courts should accord such finding judicial approval. *NLRB* v. *Gibraltar Industries, Inc.*, 307 F.2d 428 (4th Cir.), *cert. den.* 372 U.S. 911. Moreover, the Board's findings on the issue of single employer status fall well within the substantive guides established by this Court. *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398.

A review of the evidence on this issue establishes not only common ownership of the affiliated Deering Milliken corporations and the exercise of tight central control over the labor relations of the affiliates, but moreover an extraordinary degree of control and integration of the various operations of such corporations. Such control is operative as to sales and factoring functions, cost reduction efforts, joint purchasing, tax and insurance services, and the coordination of capital expenditures. The Board finding is further buttressed by Roger Milliken's personal involvement in

virtually all phases of the operation, the continued interchange of management personnel between the affiliates, and the fact that the Deering Milliken group represented itself to both the public and its employees as a single cohesive enterprise.

III

The enforcement of the modest remedy ordered by the Board would fall far short of expunging the coercive impact of the unfair labor practices involved in the Darlington shutdown. This the Board implicitly acknowledges. The egregious character and widely coercive effect of those unfair labor practices was readily perceived by both the Board and the dissenting Judges hereinbelow. The truly singular aspect of the unfair labor practices is that the employer deliberately set out to obliterate the Darlington plant as an object lesson to the thousands of workers employed in its other southern mills and to the communities in which those mills were located. The inadequacy of the Board's remedy is best demonstrated by considering the lesson that will be thereby taught other southern textile workers, the mill town communities, and large textile mill owners. The back pay and preferential hiring remedy offers little effective relief to either the Darlington workers or the stricken Darlington community, and for that reason the Board order will have virtually no deterrent effect upon this or other anti-union employers.

The "usual" and "most effective" Board remedy, where it finds that workers have been discriminatorily discharged, is a direction that they be reinstated with

back pay. Where the discharges have been effected via shutting down part of the business, the remedy necessarily includes a resumption order. *NLRB* v. *Preston Feed Corp.*, 309 F.2d 346 (4th Cir.); *R. C. Mahon Company,* 118 NLRB 1537. However, it is incumbent upon the Board to take into fair account "every socially desirable factor" in fashioning its remedy, *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198 and there are some discriminatory discharge cases involving the discontinuance of a portion of a business where an order directing the resumption of operations would be impracticable or unduly burdensome upon the employer. *NLRB* v. *Savoy Laundry, Inc.*, 327 F.2d 370 (2d Cir.). There is, however, nothing in the Darlington situation indicating that the re-establishment of a plant at Darlington would impose any unique burden on Deering Milliken. Accordingly, there was no occasion for the Board to depart from the "usual" and "most effective" remedy. The Board's failure to fashion that one and only remedy which would fully restore the *status quo ante* at Darlington constituted an arbitrary refusal to exercise its power under 10(c) of the Act.

IV

The Board's dismissal of the complaint against Roger Milliken individually was completely unjustifiable. Neither the Trial Examiner, the Board nor the Circuit Court suggested that evidence was lacking of Roger Milliken's personal unlawful involvement in the employer unfair labor practices found. The Board's decision that the charge naming "Roger Milliken, President" together with Darlington and Deering

Milliken as "the employer," was not against Roger Milliken in his individual capacity, is contrary to the well established rule that unfair labor practice charges shall not be narrowly viewed as pleadings. *NLRB* v. *Fant Milling Co.*, 360 U.S. 301. Moreover, even from a technical pleading standpoint the word "President" following "Roger Milliken" is merely *descriptio personae*. *Bynum* v. *Prudential Life Ins. Co.*, 77 F. Supp. 56 (E.D.S.C.). The record fully warrants Roger Milliken being held personally responsible for his key role in the Darlington unfair labor practices. To do so would be consistent with Section 2(2) of the Act as construed by the Board. *Industrial Fabricating Inc.*, 119 NLRB 162.

POINT I

It is a violation of the Act for an employer to shut down a plant in order to discourage union activity and to avoid having to bargain with a union.

By arrangement with the *amicus curiae*, American Federation of Labor and Congress of Industrial Organizations, the briefing of this point is left entirely to the amicus. We fully subscribe to and rely upon the brief *amicus curiae* for our own argument under this point.

POINT II

The Board's finding that Darlington and the other Deering Milliken corporations together constituted a single employer is supported by substantial evidence and entitled to judicial approval.

The majority of the Court below, having held that an employer may cease business in whole or in part for any reason, including anti-union bias, merely accepted *arguendo* the Board's finding that Darlington together with the Deering Milliken corporations constituted a single employer within the meaning of the Act.* However Chief Judge Sobeloff and Judge Bell in their dissent reviewed the record as a whole and found "that there was an abundance of evidence" to support the Board's finding of a single employer entity (R. 1908).

This point is hopefully and urgently directed toward convincing the Court that the Board's single employer finding is entitled to judicial approval here

* Earlier, in an ancillary proceeding, the Fourth Circuit Court did have occasion to rule on the issue of the ownership and control of the Deering Milliken complex. (*Deering Milliken* v. *Johnston*, 295 F.2d 856 (4th Cir.)). Thus when Cotwool and Deering Milliken and Company merged, the Board remanded to the Trial Examiner with a direction to take testimony on the merger. A District Court, at the instance of the employer, thereupon enjoined the remand. In vacating, the Court of Appeals (comprised of Chief Judge Sobeloff and Judges Haynesworth and Boreman, the latter two being in the majority in the case at hand) unanimously held that the Milliken family through majority stock ownership exercised "effective control" over the various Deering Milliken corporations. It would thus appear that no less than four of the five Circuit Judges below have certified the common ownership and control of Deering Milliken.

and now. To accord such approval manifestly entails an examination of the evidence before the Board and we are indeed reluctant to urge this over-burdened Court to involve itself in the review of a very substantial record. However, this appears to be one of those "justice delayed is justice denied" situations and both the seemingly interminable course of this litigation and the increasingly desperate plight of many Darlington workers permit us to seek nothing less than the final adjudication of all outstanding issues.

Before turning to a review of the evidence in the record supporting the Board's single employer finding, a brief recapitulation of the applicable precedents is deemed in order.

A. The Controlling Board and Court Precedents

It is well established that in reviewing Board findings, a court may not "displace the Board's choice between two fairly conflicting views even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488. Moreover, a Board determination that a group of associated corporations constitutes a single enterprise answerable for unfair labor practices is entitled to judicial approval if supported by substantial evidence on the record considered as a whole. *NLRB* v. *Gibraltar Industries, Inc.,* 307 F.2d 428, 431 (4th Cir.), *cert. den.* 372 U.S. 911. See also, *NLRB* v. *Somerset Classics, Inc.,* 193 F.2d 613, 615 (2nd Cir.),

cert. den., 344 U. S. 816; *NLRB* v. *A. E. Nettleton Co.*, 241 F.2d 130, 131 (2nd Cir.).

Some of the substantive guides upon which the issue of single employer status must be resolved were indicated by this Court in *NLRB* v. *Deena Artware, Inc.*, 361 U. S. 398, wherein the Court stated:

> "The several companies may be represented as one. Apart from that is the question whether in fact the economic enterprise is one, the corporate form being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another; one may be only a shell, inadequately financed; the affairs of the group may be so intermingled that no distinct corporate lines are maintained. These are some, though by no means all, of the relevant considerations, as the authorities recognize. See Lattin on Corporations (1959) Secs. 13, 14; Stevens on Corporations (1949) Sec. 17; Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343." *Id.* at 403-404 (footnotes omitted).

Among the factors that the Board, with subsequent court approval, has deemed significant in determining single employer status are participation in the unfair labor practices found, association in a common enterprise, representations to the general public and employees that the organization is a single enterprise, integration of operations and common control of labor relations. *NLRB* v. *Deena Artware, Inc., supra* at 402-404; *Ravena Sportswear*, 142 NLRB No. 129, *aff'd.* in pertinent part *sub nom. Oneonta Dress Co.* v. *NLRB*, not officially reported, 332 F.2d —, 56 LRRM 2497 (2nd Cir.); *Majestic Molded Products* v. *NLRB*,

330 F.2d 603, 607 (2nd Cir.); *NLRB* v. *Gibraltar Industries, Inc.*, 307 F.2d 428, 431 (4th Cir), *cert. den.* 372 U.S. 911; *A. M. Andrews Company of Oregon* v. *NLRB*, 236 F.2d 44, 45 (9th Cir.); *NLRB* v. *Calcasieu Paper Co., Inc.*, 203 F.2d 12, 13 (5th Cir.); *NLRB* v. *Condenser Corp.*, 128 F.2d 67, 71-72 (5th Cir.).

It must be emphasized, however, that none of the foregoing elements is essential to a Board determination of single employer status. There is no indispensable criterion. The reviewing court must consider the record as a whole rather than "separately and in isolation" and in so doing, the record must be reviewed in the light of the Board's right to consider facts "compositely and to draw inferences reasonably justified by their cumulative probative effects." *NLRB* v. *Radcliffe*, 211 F.2d 309, 313 (9th Cir.), *cert. den.* 348 U.S. 833. See also *NLRB* v. *Stowe Spinning Co.*, 336 U.S. 226, 227, n. 2.

B. The Board's Single Employer Finding Is Supported by Substantial Evidence

The test utilized by the Board in making its determination that Darlington, Deering Milliken and the affiliated corporations together constituted a single employer was whether "there was a sufficient degree of common ownership and common control of labor relations and operations" (R. 23). Much of the evidence hereinafter cited is uncontroverted, based on stipulation or supported by admission. Indeed virtually none of the findings on the single employer issue turned on questions of credibility (R. 117).

(1) Common Ownership

As we have previously noted (pp. 3-4, *supra*), the Milliken family owned a majority of the stock in all of these corporations, directly or indirectly, and members of the family occupied a very substantial proportion of the offices and directorships (R. 1308-1311; G.C. Ex. A-12). The extent to which the Milliken family exercised control was perhaps most dramatically indicated by the manner in which corporate lines within the organization were altered to suit its convenience (R.V. 1239a; G.C. Ex. R.-24, R. 1872-1882). Thus the series of mergers which resulted in the combination of Deering Milliken and its 13 manufacturing corporations into Deering Milliken, Inc. had no effect whatever on the wages and working conditions at the mills (R.V. 1239-h) or on the distribution of functions between the various units of the organization (R. 1322, G.C. Ex. B-10). Surely these were little more than "paper arrangements" not reflecting "business realities." *Deena Artware, supra,* at 403. Roger Milliken's domination of virtually all aspects of the operations of the Deering Milliken complex are dealt with hereinafter (pp. 26-29, *infra*).

(2) Common Control and Integration of Operations

All sales of Milliken textiles were made through a single agent which was in a position to allocate orders and production between the mills. Wholly-owned service and research subsidiaries provided the affiliated corporations with technical research information relating to new products, processes and machinery. Most of the mills' purchases were made and inspected through a single purchasing department. There was

a central consulting engineering service, tax department and insurance department. And finally, the various corporations constituting the Deering Milliken complex regarded themselves as divisions of a single enterprise.

(a) *Coordination of Sales and Factoring Functions*

All of the Milliken corporations utilized Deering Milliken and Company as their exclusive sales agent and factor (R. 110, 111) and the latter furnished said services for none other than Deering Milliken affiliates (R.V. 1239c-1239d, R. 933-941, 1328, 1336, 1360). Inasmuch as several of the mills made or could readily convert to manufacture the same textile products made by their sister mills (R. 24, 514-520, 522, 933-939), the exclusive sales function necessarily entailed the allocation of orders and hence production among the mills (R. 592, 609-610, 948). Before commencing the manufacture of a new product mills were instructed to consult with other Deering Milliken mills where such textile products had previously been produced (R. 593-594, 603-608, 1152-1367). The mills also traded or lent each other equipment, notifying sister mills when they had surplus equipment to dispose of (R. 733, 740, 752, 1164-1165).

(b) *Deering Milliken Represented to Customers and the Public as a Single Enterprise*

Products of all the Deering Milliken mills were marked under the brand name "Milliken" (R. 126; 1231-1232) and the mills were described largely in terms of the types of textiles they produce to form "a well balanced group" (R. 1326-1341). The development of new textiles was ascribed to "Milliken ex-

perts" (G.C. Ex. B-13) and plans for new mills to "Milliken's own industrial engineers" (R. 27; 1334). A brochure prepared for distribution to Milliken employees in 1955 referred generically to "Milliken mills" and "the Milliken operation" (R. 27; 1324, 1341, 1479-1482, 1651-1654). When Deering Milliken customers were invited to visit a few of "our mills" the textiles on display at each mill visited included those manufactured exclusively by other Deering Milliken mills (R. 619, 933, 941-945, 948, 1328, 1336, 1370, 1375).

(c) *The Service and Research Corporations*

The Deering Milliken Service Corporation ("Service Corporation") and the Deering Milliken Research Corporation ("Research Corporation") were wholly-owned subsidiaries of the 17 manufacturing corporations and performed services exclusively for those corporations (G.C. Ex. F-1, R. 685, 1904).

The Service Corporation's prime responsibility was to rationalize assignments at the Deering Milliken mills. The industrial engineers on its staff audited the amount of work performed in comparison with "the standard" and sought compliance with "standard procedures" such as time study techniques, incentive pay systems and utilization of standard manuals (R. 714, 1463-1467). Studies were conducted on jobs or problems common to several mills (R. 712-714, 1456, 1465-1467) and the completed studies were then made available to the other mills (R. 707-710, 712, 1454, 1456).

The Research Corporation, like the Service Corporation, was regarded as a Deering Milliken department

(R. 1784) and primarily engaged in research and development on the testing and utilization of machinery (R. 837) where Roger Milliken so recommended (R. 406-409, 454-457, 1452-1454). Thus, the Research Corporation was involved in surveying and reporting on such diverse matters as: weaving parts inspection, proper installation and protection of new machinery; providing portable work benches for maintenance men; maintenance trucks; inspection of machine shops; machinery maintenance; specialized training of maintenance men and inter-mill visits; and scheduled preventive maintenance (R. 838-966; G.C. Exs. L-1, L-3 through L-10, L-12 through L-17, L-20, L-22, R. 1570-1608).

The implementation of recommendations from the Research Corporation necessarily affected work assignments, work loads and the job content of the mill worker and hence impinged upon the field of labor relations.

(d) *Coordination of Cost Reduction Efforts*

The Deering Milliken Cost Department established bench marks for each mill with respect to overhead and labor and periodically circulated memoranda to all of the cotton mill treasurers indicating "the overall position by mill" in meeting such "bench marks" (R. 792-796, 1520). Failure to come up to the mark called for an explanation from the delinquent mill (R. 797, 1521). Mills were sent comparative studies of pay policies with respect to holiday work (R. 798, 1522) and were advised upon "legally permissible" methods of minimizing overtime payments to salaried employees (R. 798-799, 1523-1526). The Cost Department assisted mills by distributing memoranda on the reduc-

tion of unemployment cost through planning work schedules and personnel transfers. Proposals for the amendment or reform in the administration of unemployment compensation laws were also referred to the mills (R. 143-144; 810-815, 1547-1558, G.C. Exs. J-17 and J-18).

(e) *Common Control of Purchasing*

The Deering Milliken Cotton Department was responsible for all cotton purchasing (R. 1044-1045, 1725-1727) and made laboratory tests on each bale of cotton to determine whether it met "high Milliken standards" (R. 1338). The Cotton Department allocated available cotton among the mills where supplies were insufficient (R. 159; 756, 1510) and made arrangements for the sale of each mill's waste, thereby preventing the sister mills from competing with each other for the waste market (R. 26; 757).

The Service Corporation's Purchasing Department functioned as exclusive purchasing agent for mill supplies (R. 284, 730-732) in order to secure the price advantages available through mass purchasing (G.C. Ex. G-7, R. 1489-1490, 1498-1500). The Purchasing Department kept the mills advised of advances in technology and improved equipment, and, where machinery was purchased for a number of mills, arranged the delivery schedule (R. 148; 1062-1064, 1484-1500, G.C. Ex. G-18). Finally, the Department maintained lists of surplus equipment owned by each of "our mills" within the "organization" and attempted to arrange for the transfer of surplus equipment (R. 736-737) before trying to sell it to a "competitor" (R. 733-737, 1479-1482, 1495-1496, 1505-1506, G.C. Ex. G-3).

(f) *The Deering Milliken Tax and Insurance Departments*

None of the mills had its own tax or insurance department (R. 630-633). The Deering Milliken Tax Department headed by Secretary and Assistant Treasurer Kable provided the mills with the various necessary tax services (R. 25-26; 160-161). Mr. Kable was elected an officer of all the Milliken corporations in order that he might be empowered to sign tax returns on their behalf (R. 632, 1322). All of such returns were checked by the same accounting firm and counsel (R. 25, 160; 630-632) and the mill treasurers invariably followed the Tax Department's "suggestions" (R. 569). The Tax Department, in addition to filing returns, prepared reports on government contracts and filed them with the Renegotiation Board on behalf of "the textile mills affiliated with Deering Milliken & Co., Inc." (R. 1397). Kable drafted the formal minutes of the meetings of stockholders and Boards of Directors (R. 25-26, 161; 637-639, 1379-1384) and also drafted resolutions to be submitted to the mills' Boards of Directors (R. 25; 639-1379-1383, 1385-1386).

The Deering Milliken Insurance Department maintained a full range of coverage for all affiliates, standardizing and centrally controlling the various types of insurance current at each of the mills (R. 656-660). The blanket fire insurance policy, for example, named the insured as "Deering Milliken and its affiliated corporations" (R. 60). The air insurance policy covered executives of Deering Milliken "and their affiliates and associates" (R. 674-675; G.C. Ex. E-8, R. 1426). As an inducement to better safety records, the Insurance Department yearly conducted a safety contest,

awarding a plaque to the mill with the lowest lost time frequency and cash prizes to employees submitting the best suggestions for accident prevention (R. 665-667; 1410-1411, G.C. Ex. E-3). The prize winning suggestions were subsequently sent to each of the mills by the Insurance Department (R. 671, 1419; G.C. Ex. E-6).

(g) *Coordination of Capital Expenditures*

The Service Corporation's Industrial Engineering Department was required to investigate and endorse recommendations from mill treasurers on capital expenditures (R. 741-742, 781-782, 1501).

A close control of such expenditures was maintained by Roger Milliken personally and he insisted upon detailed justification of all proposed capital acquisitions disapproving such proposals if in his judgment the return on the investment would be insufficient (R. 559-561, 741-744, 1066-1067, 1083-1085, 1355, G.C. Ex. N-66). That Roger Milliken regarded such investments as being made on behalf of a single enterprise is indicated by his reference to the millions of dollars that "we . . . as an organization . . . are investing in new machinery" (R. 1754).

(h) *Interchange of Supervisory Employees*

The shifting of a supervisory employee from one Deering Milliken operation to another was a "transfer" generally involving "a promotion from within" or a "demotion" (R. 140, 141, 156; 920-923, 1431-1434, 1644, 1665, G.C. Exs. F-8 and F-9). Approximately one-half the supervisors working at Darlington between 1951 and 1956, including Darlington's mill treas-

urer, Oeland, had been transferred from other Deering Milliken corporations (R. 1190-1191, 1201-1203). All salaried personnel at the mills were covered by the same retirement plan and such coverage was unaffected by transfers between the affiliated corporations (R. 131; 1096-1100, G.C. Ex. O-17).

Recruits for management jobs were told that the "top management" of the "organization" was Roger Milliken, and that opportunities for advancement would be available through "cross transfers mill to mill—staff to line, etc." (R. 146; 883, 923, 1642-1643).

(i) *Roger Milliken's Central Role*

Aside from approving capital expenditures (p. 25, *supra*), Roger Milliken exercised actual control over all the Deering Milliken operations to an unusual degree, often concerning himself with matters of relatively minor importance.

Roger Milliken continually sought to minimize taxes for all the Deering Milliken corporations and to this end developed a "uniform procedure" for obtaining maximum depreciation and secured a single set of treasury rulings which were distributed to all mills (R. 1054-1057, 1742-1743). As head of the management hierarchy Roger Milliken laid great stress on the quarterly meetings with the mill treasurers (R. 1012, 1709-1710). It was at these meetings that "many of the policies of the whole company" were developed (R. 1022, 1714) and Roger Milliken generally sent out copies of his follow up memoranda to officers of the various Deering Milliken corporations and not merely to those immediately concerned (R. 1678, 1700, 1719,

1735, G.C. Exs. N-2, N-10, N-12, N-48 and N-56). Such memoranda dealt with widely varying matters, including comparisons between the performance of the various mills on "weave room" relative humidity (R. 1717-1720); requests for organizational charts of "our different operations" (R. 1700-1701); and a proposal for a treasurers' meeting to discuss "how our organization can adopt the most efficient and inexpensive plans of production control" (R. 1008, 1703).

Always alert to prevent Deering Mililken's trade secrets from leaking out (R. 1049, 1738-1739, 1744-1747), Roger Milliken sought to accelerate the flow of such information between the mills in "our organization" (R. 1003-1008, 1022-1034, 1704-1720, G.C. Exs. L-18, O-13). In this connection Roger Milliken himself distributed memoranda to all the mills relating to various technical improvements and suggestions such as reducing "our consumption of water" (R. 1040, 1723); tests "to be sure we are not paying the starch companies for water" (R. 1728); tests comparing cloth furnished from greige goods produced by Deering Milliken mills with that made in mills of competitors (R. 1046, 1729); cloth testing (R. 1754); studies on package sizes in spinning (R. 1756); and devices to minimize thread tangles (R. 989-990, 1686).

(3) Common Control of Labor Relations

The dissenting judges hereinbelow found (R. 1908) "overwhelming evidence" to support the Board's holding "that Deering Milliken, primarily through the person of Roger Milliken, exercised control over the labor relations of all the corporations, including Darlington. Although the details of day-to-day person-

nel relations may have been, of necessity, conducted at the mills, it is manifest that the major decisions were exclusively in the hands of Roger Milliken. Under such circumstances it is clear that Deering-Milliken must assume responsibility for control of Darlington's labor relations" (R. 1908).

Thus Roger Milliken took a personal hand in the annual recruitment drive at colleges and universities for potential Darlington employees (R. 883; G.C. Ex. M-11, R. 1633-1637; G.C. Ex. M-12, R. 1638-1644; G.C. Ex. M-18, R. 1651-1654; G.C. Ex. 5, R. 1679). So, too, he sought to reduce or abolish the number of spare hands (substitute employees), initiating a survey in all the mills to determine the number of employees working less than 40 hours (R. 1088, 1089; G.C. Ex. N-46, R. 1740). Subsequently Roger Milliken was informed by Darlington's Oeland that the number of spare hands had been materially reduced and that lost time for sickness would decrease or discharges therefor would follow (R. 1773-1774, G.C. Ex. N-68). Again Oeland, in contemplation of a one-week vacation shutdown, and with a thought to further reduction of the number of spare hands, wrote to Milliken: "I would like to have your approval before we move in the matter" (R. 1086-1087; 1772; G.C. Ex. N-67). Indicative of Milliken's pervasive influence in personnel matters was the concluding sentence in Oeland's letter to the Insurance Department seeking to effect an increase in hospital benefits for Darlington employees: "We, of course, would clear the matter with Mr. Roger Milliken should we decide to explore it further" (G.C. Ex. E-2, R. 1409).

Roger Milliken required all mill treasurers to submit monthly reports on forms prescribed by him (R. 1004, 1070, 1106-1107). Several of these reports from Darlington are found as G.C. Ex. N-77, R. 1797-1811 and G.C. Exs. O-6 through O-11, R. 1824-1859. Frequently excerpts from particularly important reports were distributed to all the mills (*e.g.* the report from the Gainesville mill found at G.C. Ex. N-17, R. 1694-1699).

Finally the most dramatic proof of Roger Milliken's firm control over the labor relations of the various corporations constituting the Deering Milliken complex was his key role in the anti-union campaign at Darlington and the ultimate decision to shut down the plant (see pp. 5-7, *supra*).

We respectfully submit that upon the manifestly substantial evidence above set forth this Court should grant approval to the Board's finding that Darlington and the other Deering Milliken corporations together constituted a single "employer," within the meaning of the Act.

POINT III

The remedies of back pay and preferential hiring for Darlington workers at other Deering Milliken mills are not appropriate or adequate in that they fail to rectify the unfair labor practices committed in shutting down the Darlington mill.

Enforcement of the modest remedy ordered by the Board would demonstrably fall far short of dissipating the coercive impact of the Darlington shutdown. Indeed the Board itself acknowledges the unique character of the employer's unfair labor practices and concedes that the remedy afforded is less than adequate. Only by directing the re-establishment of a plant in Darlington, South Carolina can a fair semblance of the *status quo ante* be restored. Under the circumstances the Board's failure to fashion the one remedy that "will effectuate the policies of [the] Act" represented an arbitrary refusal to exercise its discretionary power under Section 10(c).

A. The Egregious Character and Widely Coercive Effect of the Unfair Labor Practices

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights [to form, join and assist labor organizations] guaranteed by Section 7." Manifestly, there can be no more effective restraint on the worker's right to organize and no harsher reprisal for the exercise of that right than discriminatorily terminating his employment.

Such termination action falls within the express prohibition of Section 8(a)(3), and the Board properly found the retaliatory Darlington shutdown to constitute a particularly egregious breach of this section.

In the run-of-the-mill discriminatory discharge case the offending employer can be expected to proclaim his innocence of anti-union animus and to assert that the discharges were prompted by legitimate business considerations. The Board is then presented with the difficult task of determining the employer's true motivation. What distinguishes the Darlington plant shutdown and fully warrants invoking the ultimate in Board remedies is not so much the blatancy of the employer's coercive discriminatory actions, for such lack of subtlety might well be attributable to ignorance, ineptness or poor legal advice. The truly singular feature here present is that Deering Milliken, guided by able counsel from the outset (R. 421, 1775-1776) and carefully calculating the consequences, deliberately eschewed making any effort to cover its tracks. We submit that this course was chosen in order that the stark, unequivocal facts of Darlington would stand out in bold relief as an object lesson—a monument to the recalcitrant employer's ability to frustrate and nullify the right to organize guaranteed workers under Section 7 of the Act. As Judge Bell perceptively noted in his dissent hereinbelow,

> "The Darlington Mill was but a small unit in a vast industrial empire employing more than 19,000 persons owned and controlled directly or indirectly by the Milliken family. Its closure was intended to be and was a grim deterrent to the thousands of employees in the affiliated plants who might entertain similar notions of unionization." (R. 1909)

It is manifest that the ruthless destruction visited upon the Darlington community was intended (1) to instill fear in the remaining unorganized Deering Milliken workers, (2) to reinforce the normal antipathy to unionization widely prevalent in southern mill town communities and to prevent the relaxation of such antagonisms in an increasingly industrialized and awakening South, and (3) to provide a formula by which backward multiplant southern employers might thwart or nullify efforts at unionization. The record overwhelmingly supports our hypothesis that Deering Milliken purposefully set out to make the destruction of the Darlington community a symbol—a "Mohawk Valley" or, more aptly, a "Lidice."

In this context can it be seriously argued that the remedy proposed by the Board would succeed in dissipating "the deeply coercive effects upon other employees who may desire self-organization but have been discouraged therefrom by the threat to them implicit in the discrimination"? *Ford Motor Company*, 31 NLRB 995, 1099-1100.

In practical terms, just what lessons would the enforcement of the Board's back pay and preferential hiring remedy herein teach? Certainly it would offer no message of reassurance to the small mill town against future discriminatory plant shutdowns or in any wise diminish the hysterical fear of economic obliteration that the Darlington story has widely engendered. It would be of but slight solace to the afflicted community that some of the discharged workers from the shutdown mill might ultimately be granted preferential hiring rights at remote plants in other towns.

The preferential hiring and back pay remedy would be of almost equally small comfort to the southern mill worker contemplating his discriminatory discharge should an organizing drive result in a union victory. Understandably his joy at the prospect of being accorded preferential hiring rights by an implacably hostile and vindictive employer at other mills in strange and distant surroundings would be tempered by the concomitant necessity of abandoning the community in which he was raised and the ties of family, friends, tradition and property.

A cursory examination of the only available sampling of Darlington workers, *viz,* those produced as witnesses by the General Counsel, readily reveals the unusual stability of the Darlington work force. Thus, of the 34 witnesses indicating their length of employment, approximately half had worked at the Darlington mill 15 years or more and more than two-thirds had worked there in excess of 10 years. They include such as Nora King, who began working for Darlington in 1907 when she was seven years old (R. 379), and John Plummer, who had given the company 38 years of faithful service (R. 305). These are not workers whose pattern is to flit from town to town or from job to job.*

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* The Census Bureau's figures on mobility are based upon movement *into* rather than out of the area. They nevertheless demonstrate statistically the pattern of stability that characterizes our semi-rural population. Whereas the United States national average for the percentage of the population of all counties which had migrated in from different counties during the period from 1955 to 1960 was 17.4%, the mobility figure for Darlington County was only 8.9%. (*U.S. Bureau of the Census, County & City Data Book, 1962 (A Statistical Abstract Supplement)*, U.S. Govt. Printing Office, Washington, D.C., 1962).

Finally, what lesson would Deering Milliken and other giant southern employers similarly situated be taught by the enforcement of the remedy proposed by the Board? Certainly the meager liability for back pay entailed constitutes a small price for the terrible anti-union weapon that the Darlington shutdown purchased. Indeed it is not unreasonable to surmise that Deering Milliken's ultimate back pay liability has been more than offset by the wage savings flowing from the resultant delay in unionization. The patent inadequacy of the Board remedy from the standpoints of the Darlington workers and the mill town community, moreover, insure the future success of the Darlington formula. In short, the Board's remedy would permit Deering Milliken to retain the fruits of its deliberate violations of the Act, and the deterrent effect of the order would be virtually nil.

B. The Board Possessed Ample Power to Restore the *Status Quo Ante* at Darlington

The Board's discretionary authority in devising remedies to purge unfair labor practices under Section 10(c) of the Act is necessarily broad for, as the Court noted in *Phelps Dodge Corp.* v. *NLRB*, 318 U.S. 177, 194,

> ". . . in the nature of things, Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act—Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration."

It is thus for the Board and not the courts to determine how the effects of unfair labor practices can best be expunged. *NLRB* v. *Falk Corp.*, 308 U.S. 453; *NLRB* v. *Link Belt Co.*, 311 U.S. 584; *NLRB* v. *Greyhound Pacific Stages, Inc.*, 303 U.S. 272. However, the Board's discretionary power is not unlimited, for the remedy devised must be "appropriate." *NLRB* v. *Bradford Dyeing Assn.*, 310 U.S. 318.* The Board may not mechanically apply an established remedy without regard to special "circumstances which make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB* v. *Seven Up Bottling Co.*, 344 U.S. 344, 349. The remedy hence must be "adapted to the situation which calls for redress" *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348, and where the Board's remedial order is clearly inconsistent with or fails to effectuate the "policies" of the Act, this Court has not hesitated to remand with appropriate instructions. *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31; *NLRB* v. *District 50 UMW*, 355 U.S. 453.

Of course we do not quarrel with the Board's remedial order herein so far as it goes, *viz.* to require restitution for lost wages to Darlington workers from the date of discharge, the offer of employment at other

* See: *NLRB* v. *Cosmopolitan Studios, Inc.*, 291 F.2d 110 (2nd Cir.), wherein the court remanded to the Board with the direction to consider an appropriate modification of its order, *inter alia*, to permit the union to regain the status which it had lost as a result of the employer's refusal to bargain; *Local 833 UAW* v. *NLRB*, 300 F.2d 699 (D.C. Cir.), wherein the remand directed the Board to consider whether strikers denied reinstatement because of "misconduct" had been discharged for "cause" under Section 10(c) of the Act. Cf. *NLRB* v. *Television & Radio Artists*, 285 F.2d 902 (6th Cir.); *NLRB* v. *Local 751 Carpenters*, 285 F.2d 633 (9th Cir.).

Deering Milliken mills, and the establishment of a preferential hiring list for those for whom employment is not immediately available. Each of these remedial formulae is practical and has been judicially approved (*R.C. Mahon Company,* 118 NLRB 1537, enf. denied on other grounds, 269 F.2d 44 (6th Cir.); *Bonnie Lass Knitting Mills, Inc.,* 126 NLRB 1396; *Jays Foods, Inc.,* 129 NLRB 690, enf. denied on other grounds, 292 F.2d 317 (7th Cir.); *Hugh Major Truck Service,* 129 NLRB 322, enf. in pertinent part, 296 F.2d 466 (7th Cir.); *Sidele Fashions, Inc.,* 133 NLRB 547, enf. 305 F.2d 825 (3rd Cir.)), especially where an employer operates related enterprises or discontinues part of an operation and moves the discontinued operation elsewhere. See *NLRB* v. *Lewis,* 246 F.2d 996 (9th Cir.). In such circumstances, the Board has not hesitated to require, as here, reimbursement for necessary moving expenses. *NLRB* v. *Wollick and Schwalm Co.,* 198 F.2d 477, 482 (3rd Cir.); *NLRB* v. *Missouri Transit Co.,* 250 F.2d 261, 263-5 (8th Cir.).

However, neither back pay nor reinstatement at other Deering Milliken mills, nor preferential hiring with moving expenses, nor posting of notices and advertising in newspapers, nor bargaining with the Union on any of these matters, can adequately remedy the situation in Darlington, South Carolina. The Board itself implicitly conceded as much in its brief (p. 168) to the court below by acknowledging that "an order requiring the establishment of another mill in Darlington would be the most effective remedy to restore the status quo." Yet this surely is that case where the equities cry out for as farreaching an order as the Board may statutorily impose.

Nor would the granting of this "most effective remedy" be unprecedented. For the Board has repeatedly directed the resumption of discontinued portions of an over-all operation. Thus, in *R.C. Mahon Company,* 118 NLRB 1537, 1544, enf. denied on other grounds, 292 F.2d 44 (6th Cir.), where the plant security functions were contracted out, the Board, in accordance with its "usual policy in such cases," ordered that the Respondent "reopen the plant-protection department, . . ." Again, in *NLRB* v. *Brown-Dunkin Co.,* 287 F.2d 17, 19 (10th Cir.), enfg. 125 NLRB 1379, the Board ordered an employer, who subcontracted maintenance work after a union won an election, to re-establish its own maintenance operations and offer reinstatement to the employees discriminated against. The remedy of ordering the resumption of operations is hence not novel, much less revolutionary, and is, in the premises, perfectly fitting.* *Royal Products Company,* 77 NLRB 1217; *American Air Filter Co.,* 127 NLRB 116; *Preston Feed Corp.,* 309 F.2d 346, 351 (4th Cir.). Indeed no remedy of lesser scope would fulfill the Board's statutory mandate to fashion remedies "as will effectuate the policies of [the] Act."

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* See also: *Houston Chronicle Publishing Company,* 101 NLRB 1208, requiring the company to re-establish its "old system." and cases cited therein; *NLRB* v. *Bank of America,* 130 F.2d 624 (9th Cir.), enfg. 26 NLRB 198, directing reinstatement of a department which it had converted to contractor status for the purpose of undermining the union; *Butler Bros.,* 41 NLRB 843, enf. 134 F.2d 981 (7th Cir.) *cert. den.* 320 U.S. 789, ordering an employer to take "whatever steps may be necessary, including modification or cancellation" of a contract with a different company under which employees were transferred.

C. The Board's Misguided Attempt to Strike a Balance Between the "Conflicting Interests" of the Guilty Employer and the Innocent Victims of the Discriminatory Plant Shutdown

The equities here are obviously all on one side and yet the employer, with unparalleled gall, has made a hardship pitch that the Board, perversely we think, finds appealing. Thus the Board, invoking equitable principles, argues that in fashioning a remedy it is necessary to accommodate the employer's right to discontinue its Darlington operation with the conflicting right of the Darlington workers to organize; to weigh the hardship suffered by the Darlington workers against the burden upon the employer of resuming its Darlington operation. We submit that this compassion for the employer's plight is misplaced. Indeed it calls to mind that old saw about the child charged with patricide seeking to evoke pity as an orphan. However, assuming that some accommodation of conflicting interests is appropriate in this case, we believe that striking a fair balance would in any event dictate nothing less than the re-establishment of a plant in Darlington, South Carolina.

The usual remedy afforded by the Board where violations of Section 8(a)(3) of the Act have been found is reinstatement of the discriminatorily terminated workers with compensatory back pay. This remedy manifestly best effectuates the policies of the Act by depriving the employer of the fruits of his wrongdoing and putting the victims of such wrongdoing in the same position that they would have been in had the Act not been violated. See *Franks Bros.* v. *NLRB*,

321 U.S. 702, 705. Where, as here, it is found that an employer shuts down a portion of his business in order to deny to his workers the right to bargain through the union they have selected, the Board ordinarily directs the employer to re-establish the abandoned operation as a precondition to reinstating the discharged workers with back pay. *NLRB* v. *Preston Feed Corp.*, 309 F.2d 346, 351-352 (4th Cir.); Cf. *Fibreboard Paper Products Corp.* v. *NLRB*, No. 14 this Term.

The Board, although invested with broad discretion in fashioning remedies, must take "fair account, in a civilized legal system, of every socially desirable factor in the final judgment." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 198. Obviously there are some discriminatory discharge cases where, despite the atrocious character and wide impact of the violation found, an order directing the resumption of the discontinued portion of the business might be completely impracticable or unconscionably burdensome upon the employer; where it is simply not feasible to put Humpty Dumpty together again. *NLRB* v. *Savoy Laundry, Inc.*, 327 F.2d 370 (2d Cir.).* However, we respectfully submit that a fair analysis of the factors peculiar to Darlington fully establishes the

* In *Savoy Laundry* the court refused enforcement of so much of a Board order as required the employer to "take reasonable and business-like steps" to resume its wholesale shirt laundering division for the reasons that: (1) "Savoy is and was a relatively small, family-owned and operated business"; (2) "Savoy has not engaged in this phase of the laundry business for almost three years"; and (3) "since its patronage and good will have undoubtedly been lost in the interim, we feel that it would be unduly harsh to require the resumption of the division now." (327 F.2d at 373.)

arbitrary nature of the Board's decision to depart from its usual reinstatement with back pay remedy.

If Darlington had been a separate business entity or had even constituted a major portion of the Deering Milliken organization—if the product line had been discontinued and a sales organization disbanded—there would have been some rational basis for the Board's limited remedy. However, using the number of production employees as an index, Darlington represented no more than 3% of the Deering Milliken operation. Moreover, all of Darlington's unfilled orders and product lines were assumed by its sister mills and there is no evidence that Deering Milliken sales were even reduced, much less disrupted, by the Darlington shutdown.

If the textile industry had been in a long-term process of contraction with few new plant openings, and high capital cost, the Board's failure to direct the reestablishment of a plant at Darlington might have been understandable. However, the fact is that the major southern textile chains have been expanding rather than contracting during the past ten years. Thus, while closing three plants, including Darlington, Deering Milliken has acquired eleven new plants, ten through purchase and one by new construction. (See fn. 17, AFL-CIO brief *amicus curiae*.) Moreover, the capital investment per production worker in the textile industry is substantially lower ($10,050) than the average for all manufacturing industry ($18,227) (*Economic Almanac,* p. 273, National Industrial Conference Board, 1964).

If reassembling a competent supervisory force and training skilled workers presented an insuperable bar-

rier, or if there were some overriding objective reason unrelated to the Union's election victory, rendering Darlington an unsuitable plant site, we might acquiesce gracefully in the Board's pathetically inadequate remedy. However, an experienced managerial staff can be readily reassembled from the Deering Milliken supervisory pool (see pp. 25-26, *supra*) and the Darlington workers have the necessary inventory of skills, thereby minimizing retraining costs.

Inasmuch as there are no supervening considerations warranting a departure from the one and only Board remedy that could fully restore the *status quo ante* at Darlington, what was it that impelled the Board arbitrarily to abdicate its obvious responsibility in this case? Unfortunately neither the Board's Decision nor the succession of superb Board briefs provides any clues to this critical question. However, we surmise that, despite the Darlington shutdown and precipitous liquidation, an order directing the re-establishment of the plant would have been forthcoming if this matter had been decided by the Board within a reasonably short period following the shutdown.

Suppose that in January 1957, a month following the Darlington plant liquidation, Deering Milliken had indicated its willingness to agree to a full formal settlement of the pending Board complaint. The accrued back pay liability then being minimal, can anyone believe that the Board would have given serious consideration to a settlement on the limited basis encompassed by its Decision and Order herein; that the Board would have found anything less than an agreement to resume operations at Darlington sufficient to expunge the coercive effect of the blatant un-

fair labor practices committed by this employer? We are confident that at that juncture the Board would have dismissed out of hand any proposed settlement order not entailing the reopening of a new plant at Darlington as contrary to "its usual policy in such cases." *R. C. Mahon Company, supra.*

Aside from the continued accrual of Deering Milliken's back pay liability, there is not a scintilla of evidence that the employer has been prejudiced by the passage of time *per se.* Thus no proof was offered of any substantial change in Deering Milliken's position following the shutdown. The Board's fatuous suggestion that the substantial *amount* of back pay liability imposed on this employer somehow makes up for the failure to grant the "usual" and "most effective remedy" of plant re-establishment simply makes no sense. What meager back pay the Darlington workers ultimately receive will merely compensate them for loss of earnings. It will not restore them to their mill jobs at Darlington from which they were discriminatorily discharged, nor provide them with the union protection they fought for, nor award them damages for the suffering they have so long endured.

If the Board's limited order is permitted to stand, the moral of Darlington will be clear to all: "If the anti-union employer is big enough and rich enough to absorb some back pay liability he can brazenly flout the National Labor Relations Act with impunity, totally negate his employees' selection of a bargaining agent by discriminatorily discharging them, and forever coerce his remaining employees by the simple device of permanently shutting down, with much fanfare, a small portion of his over-all operations." This

is what "Darlington" now means to the southern textile workers, the mill town communities, and recalcitrant mill owners alike.

POINT IV

The Board erred in refusing to hold Roger Milliken individually liable for the Deering Milliken unfair labor practices.

The unfair labor practice charge by which these proceedings were initiated named Darlington, Deering Milliken and "Roger Milliken, President" as "the employer." (R. 1241 G.C. Ex. 1C) The Board's amended complaint prepared and issued by the General Counsel dropped the descriptive word "President" and named Roger Milliken as an individual respondent. (R. 2, 87-92) However, invoking the six-month limitation period under Section 10(b) of the Act, the Board ruled that the charge had not been directed against Roger Milliken in his individual capacity and hence was not sufficient to toll the statute. Accordingly the Board dismissed the complaint as against Roger Milliken individually (R. 29-30).

A. The Record Establishes Roger Milliken's Intimate Involvement in and Supports His Liability for the Unfair Labor Practices Committed at Darlington

Section 2(2) of the Act defines the term "employer" to include "any person acting as an agent of an employer," and the Board has frequently held individual corporate officers personally liable for employer un-

fair labor practices. *Industrial Fabricating, Inc.*, 119 NLRB 162; *Southland Manufacturing Company*, 94 NLRB 813, 829; *Cookville Shirt Company*, 79 NLRB 667; *Edward Taubman*, 77 NLRB 846; *Republican Publishing Company*, 73 NLRB 1085, enf. 174 F.2d 474 (1st Cir.); *Schieber Millinery Company*, 26 NLRB 937, 963; *Mount Hope Finishing Company*, 106 NLRB 480, rev. for reasons not here relevant 211 F.2d 365 (4th Cir.). In *Mount Hope, supra*, the Board, upholding a complaint against the company's President and Treasurer individually, stated:

> "As officers, and directors of these two companies, the two Millikens were acting as their agents at the time of the unfair labor practices set forth above. They were therefore 'employers' for the remedial purposes of the Act. . . ."
>
> ". . . the individual Respondents have dominated both corporations and have been responsible for their labor relations. They are thus the real parties in interest who must be held responsible under any appropriate order which the Board might enter. It would defeat the purposes of the Act to permit these individuals to take refuge behind the corporate entities of the two corporations." (106 NLRB at 498-499)

We have hereinbefore adverted in some detail to Roger Milliken's unique position in controlling the operations and labor relations of the corporations constituting the Deering Milliken complex. A measure of Roger Milliken's central role in the Darlington situation is the fact that Judge Bell, in his cogent dissent, found it necessary in reviewing the evidence supporting the Board's single employer finding to mention

Roger Milliken's name no less than twenty-three times. Thus Judge Bell held, *inter alia,*

(a) that "Roger Milliken retained ultimate control over the whole Milliken complex and acted as its chief executive officer without delineating his various capacities," (R. 1908-1909)

(b) that "Roger Milliken's ultimate and uncontradicted control of major policies affecting labor relations was illustrated by his decision with approval of his family to close the Darlington plant," (R. 1908) and

(c) that the Milliken family stock ownership permitted "Roger Milliken to exercise dominion of all phases of business and labor relations at each mill and over each and every corporate entity in the entire complex." (R. 1906)

The Trial Examiner, while holding the General Counsel's case against Roger Milliken procedurally defective, declared (R. 88):

> ". . . were the General Counsel's position here sufficient as a matter of law, the facts previously found and those here noted would warrant an Intermediate Report and the conclusion that Roger Milliken is liable individually even without decision on such issues as the extent of his control of Darlington stock."

Thus, no one having occasion to examine the record herein has suggested that evidence is lacking of Roger Milliken's personal unlawful involvement in the employer unfair labor practices found. No one has suggested that the complaint against Roger Milliken individually should have been dismissed on the merits.

However, in addressing itself to the procedural aspects of the charge and complaint against Roger Milliken, the Board initially erred by taking an over-technical approach and then proceeded to compound this error by a ruling that, even from a purely technical standpoint, is utterly indefensible.

B. The Unfair Labor Practice Charge Against "Roger Milliken, President" Furnished a Sufficient Basis for Holding Roger Milliken Personally Liable

The Board, in justification of this holding, noted that the charge "speaks in the singular of the employer and thus does not suggest that Roger Milliken, individually, was regarded as an employer separate and apart from his position as President" (R. 29-30). Moreover, the Board found, largely on the basis of the Union's offer of proof at the first hearing, that the Union had intended to include Roger Milliken as a connecting link between the various corporations rather than as an individual (R. 29-30).

As to the first justification cited, the Union consistently maintained throughout the hearing and thereafter that Darlington, Deering Milliken and Roger Milliken together constitute one employer. Thus the use in the charge of the singular form "employer" no more indicated that the Union did not hold Roger Milliken personally liable than that it did not intend to hold Deering Milliken liable. The offer of proof was concerned with the "single employer issue" and manifestly the allegations most relevant to that issue were those pertaining to Roger Milliken as a "connecting link." However, even in that offer

of proof Roger Milliken's individual involvement in the company's campaign was repeatedly noted (R. 301, 302).

Even viewing the unfair labor practice charge herein as a formal pleading, the word "President" following "Roger Milliken" was merely *descriptio personae* and hence not properly construed by the Board as involving him only in his official capacity. *Clark* v. *Porcelain Mfg. Co.*, 8 S.C. 22; *Bynum* v. *Prudential Life Ins. Co.*, 77 F. Supp. 56 (E.D.S.C.). However, an unfair labor practice charge cannot properly "be measured by the standards applicable to a pleading in a private law suit." Its purpose is "merely to set in motion the machinery of an inquiry" and there can be no justification for "confining such inquiry to the precise particularization of a charge." *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 307-308. Thus even if the Union's charge had not properly cited Roger Milliken individually as a respondent, this would not have been a fatal defect inasmuch as Roger Milliken was certainly on notice that the charge was directed against him. *Deluxe Motor Stages*, 93 NLRB 1425, enf. 196 F.2d 409 (6th Cir.).

We submit that holding Roger Milliken personally liable for the flagrant unfair labor practices for which he was primarily responsible would not only be fully warranted by the record herein and entirely consistent with the Act as construed by the Board, but moreover would provide substantial deterrent value to the otherwise pathetically inadequate Board remedy herein.

CONCLUSION

For the reasons hereinabove stated and in the brief *amicus curiae* filed by the AFL-CIO, it is submitted that the decision below should be reversed and the Board's decision and order appropriately modified.

Respectfully submitted,

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APPENDIX A

National Labor Relations Act

Sec. 2 * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

* * * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of em-

ployment to encourage or discourage membership in any labor organization: * * *

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * *

Sec. 10. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(f) * * * [The court] shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree en-

forcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * *

Labor Management Relations Act

Sec. 1. * * *

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.